NO. 47763-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SHANE ALLEN DELORENZE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01224-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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STATEMENT OF THE CASE

On June 20, 2015, J.A. and her husband of ten years, Eddie, held a party at their home to celebrate J.A.'s thirtieth birthday. RP 163-164. J.A. and Eddie provided food and drinks for their guests, and some of the guests brought alcoholic beverages of their own. RP 167. Among the invited guests were two of J.A. and Eddie's friends from the Air Force, Ryan Jeffries and Tyler Derricks. RP 161-163, 213, 217. J.A. and Eddie are both air traffic controllers in the Air Force. RP 213, 295. Because Tyler and Ryan were coming from Puyallup, it was understood that they would be staying at J.A. and Eddie's so that there would be no risk of them driving while intoxicated. RP 175, 217-218. J.A. and Eddie had plenty of bedrooms to accommodate their guests. RP 175. Ryan asked Eddie if it would be okay for him to bring another friend of his, Shane DeLorenze, who was unknown to J.A. and Eddie. RP 163. Eddie and J.A.

agreed, seeing no reason why they couldn't accommodate another guest. RP 298.

The guests enjoyed food and alcohol for several hours, although the party was small and low key. RP 165, 171. J.A. had minimal interaction with Shane DeLorenze that night, having never met him before. RP 177, 223. J.A., who was celebrating her birthday in the comfort of her own home, became very intoxicated. RP 172, 308-309. At around 12:30 or 1:00 in the morning Eddie, who was also intoxicated, helped his wife upstairs so she could go to bed. RP 172-173. J.A. vomited while getting ready for bed, but ultimately washed up and got into bed. RP 308. Eddie retired to the kitchen where he continued his conversation with his friend Ryan. RP 178. Without Eddie being aware of it, DeLorenze snuck upstairs to the master bedroom where J.A. was asleep. RP 178-181. While J.A. slept and was essentially passed out, DeLorenze removed his pants, crawled on top of her, and raped her. RP 179-181, 312.

While talking to Ryan in the kitchen, Eddie heard noises upstairs that he described as thumps. RP 179. Ryan called upstairs, yelling out "Shane?" RP 179. Eddie heard another thump and, after an awkward moment, became aware that someone was in his bedroom. RP 179. Eddie raced upstairs to his bedroom with Ryan on his heels. RP 179. Eddie entered his bedroom and witnessed DeLorenze on top of his wife, between

her spread legs, thrusting himself into her. RP 179-180. DeLorenze was naked below the waist. RP 181. Eddie was in shock, and screamed "what the f---?" RP 181. DeLorenze leaped off of J.A. and fled the room. RP 181.Ryan was also dumbfounded and shocked to see DeLorenze in J.A.'s bedroom. RP 235, 238. Ryan ran after DeLorenze and ultimately departed the residence in his car with DeLorenze (after first retrieving DeLorenze's underwear and pants from J.A.'s bedroom). RP 181-182, 239.

Eddie was shocked and could not process what he'd seen, likely compounded by his intoxication. RP 182. By his own candid and disturbing admission, he slapped his wife in anger after DeLorenze fled his bedroom, assuming she'd been unfaithful. RP 182. He knew his wife was asleep, and offered no explanation for how an incapacitated woman can be properly accused of cheating on her husband. RP 182. After slapping his sleeping wife she came to and said "What? What?" RP 183. Eddie explained to her that another man had been on top of her but J.A. was confused. RP 183. Finally realizing that his wife had been raped, Eddie called 911. RP 183.

J.A. recalled DeLorenze being weird. RP 304. "He was always pouring a shot. He was always in my face." RP 305. She told him she was "done" drinking, but he kept at her, calling her "Birthday Girl," asking her to take a shot. RP 305. J.A. went upstairs to go to bed and got sick because

she could not handle the alcohol she'd consumed. RP 308. She cleaned up, washed her face and brushed her teeth. RP 308. J.A. recalled that she was asleep in her bed when she felt pressure on top of her that she naturally assumed was her husband. 312. She was very drunk; more intoxicated than she'd ever been before. RP 346. J.A. has low tolerance. RP 309. It was later determined that her blood alcohol level was approximately .11 per grams per 100 milliliters at the time of the rape. RP 277. She awoke to her husband slapping her, discovering that the weight on top of her had not been her husband. RP 312, 313. She recalled feeling a pressure "leaving her body." RP 314. J.A. was extremely upset, realizing she'd been raped, and she and Eddie called 911. RP 183, RP 314-315.

J.A. was transported to the hospital where a rape examination was performed by a SANE nurse, and a rape kit was completed. RP 378-81.

DNA testing of items from the rape kit revealed that no semen was found on the vaginal swabs from J.A.'s vagina. RP 513. However, amylase, which is usually found in saliva, was found on the swabs taken from J.A.'s vagina. RP 513. DeLorenze's penis was swabbed for DNA as well. RP 468, 514. J.A. was found to be a major contributor of the DNA found on the penile swab. RP 515. The minor component on the penile swab made up less than 25% of the sample, meaning J.A.'s contribution

was more than 75%. RP 515. If the male does not ejaculate in a rape, it is not uncommon that semen would not be found in a rape kit. RP 517.

DeLorenze was convicted of rape in the second degree for having sexual intercourse with a person who was incapable of consent due to mental incapacity or physical helplessness. CP 2, 24. This timely appeal followed. CP 41.

ARGUMENT

I. The evidence is sufficient to sustain the conviction of rape in the second degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appropriate test for determining the sufficiency of the evidence is whether, after viewing the evidence most favorable to the State, "any rational trier of fact could have found the essential elements" of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). An appellant challenging the sufficiency of

evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, *supra*, at 221. "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds by *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

a. Sufficient evidence of intercourse.

DeLorenze claims that insufficient evidence supports the jury's conclusion that he had intercourse with J.A. This claim is meritless. The jury was instructed that intercourse occurs when there is any penetration, however slight, by the sexual organ of the male into the sexual organ of the female, or any penetration of the vagina, however slight, by an object, including a body part, when committed on one person by another. CP 16. Here, Eddie Ashley saw the defendant thrusting into his wife in the manner in which sexual intercourse occurs between a male and female. Further, J.A.'s DNA was found *on the defendant's penis.* The evidence is more than sufficient for a rational trier of fact to find that the defendant penetrated J.A.

b. Sufficient evidence of mental incapacity or physical helplessness.

DeLorenze next claims that there is insufficient evidence on which any rational trier of fact could have found that J.A. was mentally incapacitated or physically helpless at the time of the attack. In his brief, DeLorenze resurrects the incredible claim he made below that because, in her stupor, J.A. believed that the pressure she felt on her body was her husband, she was capable of consenting to any man crawling on top of her and forcing himself into her vagina—and therefore did, in fact, consent to the defendant, who was a virtual stranger to her, having intercourse with her while she was barely aware of what was happening. This argument does not warrant serious consideration or response.

The evidence showed that J.A. had an approximate blood alcohol level of .11 at the time she was attacked, substantially more than the highest alcohol level at which someone can be permitted to drive without offending the per se law. J.A. testified that she has low tolerance for alcohol. She testified she was asleep and only learned she'd been raped when she awoke to her husband slapping her and telling her what happened. The jury, having found J.A. credible, could have rationally found she was both asleep and very intoxicated when she was attacked. The evidence overwhelmingly established that J.A. was mentally incapacitated and physically helpless at the time DeLorenze invited

himself into her room and attacked her. The conviction should be affirmed.

II. The remarks of the prosecutor do not constitute misconduct warranting a new trial.

DeLorenze claims that the prosecutor committed misconduct on two occasions during closing argument. DeLorenze did not object to either remark now complained of, and raises this claim for the first time on appeal.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who

fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Meaning, the reviewing court will not even review the claim unless the defendant demonstrates that the misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The reviewing court should focus more on whether the allegedly improper remark could have been neutralized by a curative instruction and less on whether it was flagrant and ill-intentioned. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003);

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

"In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). "[T]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Here, DeLorenze fails to show that the remarks in question were ill-intentioned or flagrant, that they could not have been obviated by a curative instruction, or that the error, if any, was prejudicial to him in light of the overwhelming evidence presented by the State.

a. *"Do your job."*

The first remark complained of by DeLorenze occurred at the close of the State's closing argument, where the prosecutor said:

> Ladies and gentlemen, the evidence is clear, it's conclusive, it's strong, proof beyond a reasonable doubt the defendant did have sexual intercourse with [J.A.] at a time when she was incapable of consent. Please do your job. Find the defendant guilty.

RP 617. DeLorenze did not object to this remark.

Assuming without conceding that it is improper for a prosecutor to use the words "do your job" when speaking to the jury, the erroneous (and un-objected to) remark here was neither flagrant and ill-intentioned, nor was it incurable by a curative instruction. In *State v. Coleman*, 74 Wn.App. 835, 876 P.2d 458 (1994), the Court of Appeals recognized that it is improper for a prosecutor to imply to a jury that its "job" is to return a verdict of guilty. Specifically, in *Coleman*, the prosecutor implied to the jury that if they rejected the State's theory of the case, they would be violating their oath as jurors and not doing their job. *Coleman* at 839. The

argument in *Coleman*, which drew an objection from the defendant, was far more egregious than the singular plea made to the jury here.

Nevertheless, the *Coleman* Court found that there was not a substantial likelihood that the misconduct affected the verdict and affirmed the defendant's conviction. *Coleman* at 841. First, the argument was the singular instance of misconduct in the trial. Second, the prosecutor told the jury that it would respect its finding and not "second guess" the jury. Third, the remark did not appear threatening to the trial judge, who directly observed the prosecutor's tone and demeanor. *Coleman* at 841.

The singular remark here is far less problematic than what occurred in *Coleman*. Defense counsel's lack of objection suggests that it did not appear that the prosecutor was unduly pressuring the jury to return a verdict of guilty. When viewed in the context of the entire argument, and when viewed against the strength of the State's case, it cannot be said that this brief remark could not have been obviated by a curative instruction. This claim of misconduct should be rejected.

b. *"Absurd, far-fetched"*

The second instance of claimed misconduct occurred when the State said: "And as we stand here today—or sit, we're still waiting for a defense theory that makes sense. Everything that Defense has advanced up to this point has been so absurd." RP 616. At that point DeLorenze

objected on the basis that he felt the prosecutor was stating his personal opinion. The court overruled the objection. The State then remarked: "It has been so absurd, so far-fetched it makes no sense whatsoever." RP 616. DeLorenze did not object to this remark.

DeLorenze claims that the State committed misconduct when it characterized his theory of the case as absurd and far-fetched. DeLorenze did not object to the first instance of the State using the term "absurd" on the same basis that he now complains, nor did he seek a curative instruction. It is the State's position, therefore, that DeLorenze must show that the remark was not only prejudicial, but that it was flagrant, ill-intentioned, and could not have been cured by a curative instruction. Even the objection to this remark was preserved below, DeLorenze has still not shown the remark so prejudicial as to warrant a new trial.

Unlike the primary case DeLorenze relies on, *State v. Lindsay*, 180 Wn.2d 423, 433-34, 326 P.3d 125 (2014), the prosecutor did not impugn defense counsel by suggesting that she was being dishonest with the jury, or accuse her of using "sleight of hand," as in *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). A prosecutor is free to make remarks that "can fairly be said to focus on the evidence before the jury." *Thorgerson* at 451. A prosecutor's remark which implies deception or dishonesty on the part of defense counsel is improper. Here, there was no accusation of

deception or dishonesty. The prosecutor merely argued that the interpretation of the evidence offered by defense counsel in her closing argument was not reasonable. There was no prejudicial misconduct, and any misconduct could easily have been cured by an admonishment or curative instruction from the court. If there was misconduct, there is not a substantial likelihood it affected the verdict. The evidence in this case was overwhelming. The defendant was actually caught in the act of raping J.A., and her DNA was found on his penis. She was indisputably intoxicated and asleep when the attack began. Calling the defendant's theory of the case—which included a claim that she consented to sex with DeLorenze because she believed she was having sex with her husband—absurd was a fair characterization, and there is not a likelihood the outcome would have been different absent the remark.

III. Defense counsel was not ineffective in electing not to make certain objections.

DeLorenze was not denied effective assistance of counsel when his attorney failed to object (or objected on a basis not preserved for appeal) to the remarks of the prosecutor during closing argument referenced above. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the

challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100,

147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn.App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Madison* at 763; *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, "[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a

favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal." *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). This court reviews a claim of ineffective assistance of counsel de novo because it presents a mixed question of law and fact. *In re Pers. Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

As noted above, the "do your job" remark was singular and fleeting and did not even approach telling the jurors they would violate their oath as jurors unless they agreed with the prosecutor's theory of the case. There is not a reasonable probability that but for defense counsel's failure to object to this remark, the result of this proceeding would have been different. Eyewitnesses to a rape in progress are exceedingly rare, but in this case there was an eyewitness (Mr. Ashley) who interrupted the crime. Additionally, the DNA evidence found on the defendant's penis established his guilt beyond a reasonable doubt and was unaffected by the prosecutor's remarks.

Likewise, the prosecutor's accurate characterization of the defendant's theory of the case as absurd did not create a reasonable probability that, but for the prosecutor's remark, the result of the proceeding would have been different. Again, this characterization was not misconduct. The prosecutor is permitted to argue that the defendant's

theory of the case is unsupported by the evidence and illogical. That is the very purpose of closing argument—for each side to persuade the jury as to the merits of his position. There is not a reasonable probability that had the prosecutor used different words (e.g. "nonsensical," "illogical," "unserious") rather than "absurd" and "far-fetched," the result of the proceeding would have been different. To the extent that the defendant might posit that the prosecutor is flatly disallowed from arguing the weaknesses of a defendant's proffered theory of the case—using any terminology—lest he be accused of "disparaging defense counsel," such an argument lacks merit. DeLorenze was not denied effective assistance of counsel by defense counsel's decision not to object to, and further emphasize, the prosecutor's argument.

The defendant was also not prejudiced by his counsel's decision not to object the admission of the defendant's recorded police interrogation. During the interrogation, the defendant was able to remember many salient details of the previous evening, including what he drank. RP 426-461. When asked if he had sex with J.A., the defendant said "not to my knowledge," and claimed not to remember. Id. Officer Free confronted him with the fact that witnesses saw him having intercourse with J.A. and offered him the opportunity to say it was consensual. Id. Despite Officer Free's attempts, the defendant maintained his story that he

didn't remember that singular part of the evening. Id. Defense counsel was not ineffective in electing not to object to the admission of the interrogation.

First, the statements made by Officer Free during the interrogation did not constitute inadmissible opinion testimony. *State v. Notaro*, 161 Wn.App. 654, 668-69, 255 P.3d 774 (2011). The statements made by Officer Free were designed to see whether the defendant would change his story and "were designed to challenge the defendant's initial story and elicit responses that are capable of being refuted or corroborated by other evidence or accounts of the events discussed." *Notaro* at 669; see also *State v. Demery*, 144 Wn.2d 753, 766, 30 P.3d 1278 (2001). Second, the recording provided the defendant with a means of getting his side of the story in front of the jury without having to testify and be subject to cross-examination. Had the recording been spliced to remove this portion of it, the jury may have found that suspicious and engaged in prejudicial speculation about what had been cut out. A prudent defense attorney would not want to invite such speculation or look as though the defendant sought to hide anything from the jury. Third, the defendant never confessed to the crime, even after being accused of not telling the truth (as an interrogation tactic) by Officer Free. The defendant held his ground. Finally, the other parts of the interview (of which the defendant does not

complain in this appeal) were far more damaging to the defendant. Specifically, the portion where he appears to realize, for the first time, that he is not wearing any underwear. RP 440. The defendant came off as particularly untruthful in that portion of the interview.

Counsel's decision not to object to the admission of the defendant's police interview was a reasonable tactical decision and even if it were not, there is not a reasonable probability that but for the jury hearing that portion of the police interview, the result of the proceeding would have been different. As noted elsewhere in this brief, the evidence in this case overwhelmingly established the defendant's guilt. He was caught in the act, and the victim's DNA was found in a large quantity on his penis. There is no evidence that the victim was in a position to consent to intercourse. She was asleep and intoxicated when the rape began. The defendant was a virtual stranger to her. Defense counsel was not ineffective in his decision making and the defendant was not prejudiced by counsel's performance. The conviction should be affirmed.

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CONCLUSION

The judgment and sentence should be affirmed.

DATED this 17 day of June, 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____ 37878
ANNE M. CRUSER, WSBA #27944
for Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTOR

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